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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JANE LAUBACHER LAUT, Defendant and Appellant.	2d Crim. No. B277216 (Super. Ct. No. 2015011510) (Ventura County)

A jury found Jane Laubacher Laut guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189, subd. (a))[1] and that she personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)). The trial court sentenced her to 25 years to life for murder, and a consecutive 25 years to life for the firearm enhancement. We remand for the trial court to exercise

[1] All further statutory references are to the Penal Code unless otherwise stated.

its discretion on whether to strike the firearm enhancement. In all other respects, we affirm.

FACTS

On August 27, 2009, at about 11:30 p.m., Laut shot her husband, Dave, with a .22 caliber single-action handgun five times on the patio of their Oxnard home. She hid the gun in a grandfather clock and called 911. She told the operator that she heard gunshots and that there was a possible intruder. The operator asked if there were any weapons in the home of which the officers should be aware. She replied no, all of the guns were locked in a gun safe. She told the operator that she and her son were in the house and that her husband had gone outside.

When Oxnard Police Officers Matt Crenshaw and Jason Graham arrived at the house, Laut was still on the phone with the 911 operator. They could see her inside the house. She was sobbing. They could hear her say, "I see shadows, I see shadows"; and, "He didn't come back inside. He went outside. He didn't come back inside."

When the police contacted Laut, she told them her husband went outside through the rear sliding door and did not come back in. The officers searched the back yard and found Dave's body on the ground with blood pooling around his face. He was dead. Because Dave was lying on his stomach with his arm under him, the police thought he could be holding a gun and that the gunshot was self-inflicted.

Officer Larry Eklund responded to the Laut residence. Officer Graham told him that it looked like a shooting, possibly self-inflicted. Eklund asked Laut if there were any weapons in the house. She told him all the weapons were in a gun safe.

Laut asked Eklund if her husband was all right. Eklund told her he had been shot, possibly self-inflicted. She kept saying, "he was shot," as if she could not understand. Eklund asked Laut if she and her husband were having any problems. Laut said no, nothing out of the ordinary, just what every normal couple goes through. Laut said Dave had not told her anything that would indicate he was planning to harm himself.

Police Sergeant Jeffrey Mathews arrived at the house. He viewed Dave's body and determined that one shot entered Dave's back. That eliminated suicide. Mathews knew there was a shooter somewhere.

Mathews asked Laut where she was at the time of the shooting. She said Dave had gone into the yard. She remained inside by the sliding glass door. She heard Dave say, "What the F?" Then she heard three shots. Mathews contacted other sergeants to coordinate a canvass of the area in search of a shooter.

Officer Eklund was in the kitchen with Laut. Laut went to the sink and got a drink of water from a glass. She took another drink of water without a glass by cupping her hands under the faucet, even though the glass was still nearby.

Detective Sandra Plymire arrived and sat at the kitchen table with Laut. Mathews placed a gunshot residue (GSR) kit on the table. Laut looked at the kit and asked to use the bathroom. Plymire escorted her.

Laut and Plymire returned to the table. Plymire was busy preparing the GSR kit when she noticed that Laut was back in the bathroom. Plymire ran after her and found her in the bathroom washing her hands. She wiped them on a towel. Plymire told her to stop. Laut apologized and said she had

forgotten to wash her hands. Plymire tested Laut's hands for GSR. But Plymire failed to put a bar code on the kit and the police lost the kit.

At the house, neither Mathews nor Plymire noticed any signs of injury to Laut's body, nor did she complain of any. The house showed no signs of an altercation.

Plymire transported Laut to the police station and placed her in an interview room. Detective Erik Mora conducted the interview. Laut told Mora she heard a bump just prior to Dave going outside and that she saw shadows in the side yard. She denied her relationship with Dave was physically or emotionally abusive. Mora told her there were some things she was leaving out, and asked her to tell him what really happened. Mora told her the only question was, "Why did these things happen[?]" She denied she killed her husband.

After the interview, Detective Sonia Sanchez took Laut to a dressing room to collect Laut's clothes. Sanchez gave Laut a jumpsuit to wear. When Laut took off her shirt, Sanchez noticed two contusions on Laut's upper left arm. One was an inch and the other was half an inch in diameter. When Sanchez asked Laut how the injury occurred, Laut said a dog did it.

The police executed a search warrant on Laut's residence. Documents discovered in the house showed Laut and her husband were having financial difficulties. The documents included letters from collection agencies and a notice of wage garnishment for unpaid taxes. The police also found a life insurance policy naming Dave as the insured and Laut as the beneficiary. The police found a .22 caliber revolver in the grandfather clock. Bullets fired from the revolver matched bullets found in Dave's body. The police recovered a computer

from the house. A computer forensic examiner found searches for divorce and for a divorce attorney under Dave's user account. The police found unwashed women's clothes in the laundry. The clothes tested positive for GSR and blood.

Dr. Ronald O'Halloran conducted an autopsy on Dave's body. There were five bullet wounds including four to the head. One of the wounds went from the back of the head through the brain and likely caused death. That wound was created when the gun was an inch or two away from the head, as indicated by soot deposited in Dave's hair. There was a sixth wound that O'Halloran believed was caused by blunt force trauma to Dave's head, although it could have been caused by a bullet glancing off the head.

Carlos and Esther Anaya were neighbors of the Lauts. Their houses were so close together that they could sometimes hear conversations coming from the Lauts' residence. They were awake at the time of the shooting. They heard the gunshots, but they did not hear any voices raised in anger before or after the shots.

DEFENSE

Laut testified in her own defense. Laut said she knew Dave when they were in high school. They began dating in college and married in 1980. From early in their marriage, Dave was verbally and physically abusive toward her. He blamed it on the drugs he was taking for the 1984 Olympics where he won a bronze medal in shot put. But the abuse continued even after he stopped training. The abuse included beatings, forced oral copulation, and anal rape.

After unsuccessful attempts to have a child, the Lauts adopted a son from Korea. Dave was verbally abusive and

physically aggressive toward their son. Dave killed their son's pet turtles and threatened to kill the family's dogs. Dave made racist comments about their son.

Laut's neighbors and relatives testified in her defense. Their testimony supported Laut's claim that Dave abused her and her son. They observed injuries on her body and testified she wore concealing clothing even on very hot days.

Laut's Version of the Killing

Laut testified that on August 27, 2009, she took her son to the beach. They arrived home after Dave, and Dave was angry she was not there when he arrived home. She prepared a hamburger for Dave. He threw it at her and told her to prepare another. By this time it was late. Dave sat in a chair muttering to himself and later yelling. The tension in the house was thick.

Laut went into her son's room to watch television with him. Dave was still in the living room talking to himself. Then Dave came into the hallway. She heard him say about her, "I'm so sick of her fucking shit, . . . I'm so sick of this shit." Laut looked out into the hallway. Dave came closer to her. She saw he had a handgun in his hand. He kept saying, "I'm sick of your shit, both of you have no respect . . . . " He told her, "[T]hat little fucker in there . . . I want to blow his fucking little head off, and you are going to watch." Dave waved the gun around as he was yelling.

Laut managed to get by Dave and into the living room. He repeated that he was going to blow their son's head off. Laut went out onto the patio. She was trying to get Dave out of the house and away from their son. Dave followed her out and told her to get back into the house.

Dave slipped on the edge of the patio. When he slipped, Laut pushed his leg with her foot. He grabbed Laut's arm. They

were starting to fall. She grabbed his hand that was holding the gun. She pushed the gun away from her face. They both had their hands on the gun. She heard two shots go off. She did not know if those shots hit him. They fell. Her leg was under his when they fell. She tried to push him off, but he kept coming after her. She thought he was going to kill her. She shot him three more times. She went into the house and put the gun in the clock. At that point, she did not think Dave was dead. She called 911 because she thought he was hurt. She admitted she lied to the police about there being an intruder. She said she wanted time to get her son out of the house and with her family.

Expert Testimony on Battered Woman Syndrome (BWS) and Posttraumatic Stress Disorder (PTSD)

Psychologist Katherine Emerick, Ph.D., testified that she first saw Laut the evening after the shooting. Laut suffers from Posttraumatic Stress Disorder (PTSD). Battered Woman Syndrome (BWS) is part of the PTSD diagnosis. Laut also suffers from major depression, anxiety, avoidant personality disorder, and dependent personality disorder.

Over six years of therapy, Laut recounted hundreds of incidents of abuse from Dave. The abuse included verbal abuse, physical abuse, and sexual violence. Dave also threatened her with death. He placed a gun to her head and said, "[Let's] play Russian Roulette." He took out his knives and told her he could cut her into a million pieces.

After six years of therapy, Laut no longer suffers from major depression and her PTSD is in partial remission.

Gail Pincus, LCSW, is an expert on PTSD and BWS. Pincus interviewed Laut three times. She concluded Laut is the victim of BWS. Dave isolated Laut from her family and friends

and abused her emotionally and physically. Victims will try to accommodate the abuser and become emotionally numb.

Pincus said that at some point the amount of fear the victim feels may become so great that it does not matter what the abuser does to them. She testified: "So what we know is that when you have that level of fear that you're — that the part of your brain that covers emotions is the part of the brain that is functioning, so it functions with a — by cutting off your executive function, the part of your brain that is very reasoned, that can sit back and say, okay, the best way to handle this would be to call the police, call my family, call the battered woman's shelter, do something. That part of your brain is non-existent. It is not functioning at all. [¶] The part of your brain that says I'm scared, I'm scared, I'm scared, I'm scared, I'm in danger, I'm in danger, I'm in danger, I'm in danger, that part is going full blast, absolutely full blast so that you act and react."

DISCUSSION

I.

Laut contends the trial court denied her the right to present a defense when it restricted expert testimony on the effect of BWS on her state of mind.

The People made a pretrial motion to prohibit defense experts from testifying to Laut's specific mental state at the time of the shooting. Laut acknowledged that the state of the law at the time prohibited such evidence. (See *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1365 [expert could not testify that defendant acted without intent to kill].) The trial court granted the People's motion and excluded expert testimony on Laut's state of mind at the time she committed the offense.

Several months after the verdict in this case we decided *People v. Herrera* (2016) 247 Cal.App.4th 467 (*Herrera*). Herrera was convicted of first degree murder for stabbing a friend to death. The defense evidence was that Herrera was suffering from PTSD related to prior sexual assaults by men other than the victim. Herrera testified that he was giving the victim a ride when the victim put his hand down Herrera's pants. When Herrera rebuffed the victim, the victim tried to stab him with a knife. Herrera got control of the knife and stopped the car. The victim punched him, got out of the car and ran. Herrera said he was in an "'irrational state.'" (*Id*. at p. 473.) He was in a rage and kept stabbing the victim. He thought the victim was everybody who had sexually assaulted him. Defense counsel asked Herrera's expert whether Herrera was in a dissociative state, whether he was psychologically impaired, and whether he suffered from PTSD on the date of the murder. The trial court sustained the People's objections to all three questions on the ground that an expert cannot testify as to the mental state of the defendant at the time of the offense. We reversed. We determined that although the expert could not testify that the defendant lacked the specific intent required for the crime, the expert could testify to the defendant's mental state at the time of the offense. (*Id*. at p. 477.)

Under *Herrera*, it was error not to allow Laut's experts to testify to her state of mind at the time she committed the offense. But the error was harmless.

First, both Emerick and Pincus testified that Laut suffered from PTSD and BWS. Pincus testified that a person suffering from BWS can lose executive function; that is, the reasoning part of the brain, so that she acts and reacts. Given that Pincus was

testifying for the defense at Laut's trial, it would have been obvious to the jury that Pincus was referring to Laut's state of mind at the time of the shooting. There was no need for Pincus to testify that Laut had lost the reasoning part of her brain at the time of the shooting.

Second, Laut did not testify that the shooting occurred because she lost executive function. Instead, she testified she was acting in self-defense and in the defense of her son.

Third, Laut's testimony lacked credibility. Initially she told the police that Dave was shot by an intruder. Her lies to the police showed a consciousness of guilt and severely diminished the credibility of her belated claim of self-defense. Moreover, Laut asked the jury to believe that she was able to wrest control of the gun from a former Olympic shot putter.

Finally, the gun Laut used is a single-action revolver. Pulling the trigger alone would not cause it to shoot. Each time she shot, Laut had to pull back the hammer before pulling the trigger. It shows Laut's actions were purposeful. In addition, Dave was shot once in the back of the head at close range, showing the shooting was not defensive.

There is no reasonable probability that Laut would have been able to obtain a more favorable result had the trial court not erred. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II.

Laut contends the trial court denied her the right to a defense when it excluded evidence of Dave's steroid use and resulting aggression.

The People made a pretrial motion to exclude evidence of Dave's steroid use. The court granted the motion because Laut did not offer expert testimony that steroid use causes violent

behavior. The court stated it would reconsider the matter if Laut offered such an expert. Laut never did.

Laut cites no authority to support a claim that the trial court erred in requiring an expert to draw the link between steroid use and violent behavior. Moreover, any error would be harmless by any standard. The trial court allowed Laut to introduce extensive evidence of Dave's abusive behavior. What caused the behavior is irrelevant.

III.

Laut contends the trial court erred when it refused the defense's special instruction on manslaughter.

At trial, the defense proposed the following instruction on heat of passion: "Emotions that constitute 'passion' include fear, depression, and sadness, and do not have to include anger. These emotions may constitute provocation for purposes of the heat of passion defense. These emotions can develop over time and do not require some words or act by the victim which occurs shortly before the killing."

The trial court denied the request. Instead, the court gave CALCRIM No. 570. CALCRIM No. 570 provides in part: "Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time."

CALCRIM No. 570 informs the jury that heat of passion can be caused by "any . . . intense emotion." That would include fear, depression, and sadness. CALCRIM No. 570 also informs the jury that "[s]ufficient provocation may occur over a short or long period of time." CALCRIM No. 570 told the jury everything it needed to determine whether Laut was acting under a heat of passion when she killed Dave. The proposed defense instruction was unnecessary.

Laut's reliance on *People v. Wright* (2015) 242 Cal.App.4th 1461, 1494 is misplaced. In *Wright*, the Court of Appeal held it was error for the trial court to refuse to give CALCRIM No. 570 on provocation and heat of passion. Here, the trial court gave the instruction.

IV.

Laut contends the trial court erred in refusing her proposed instruction that emotions other than fear can be a causal factor in a justifiable homicide.

The trial court gave CALCRIM No. 505 on justifiable homicide in self-defense or defense of another. The instruction states in part: "The defendant is not guilty of murder if she was justified in killing someone in self-defense or defense of another. The defendant acted in lawful self-defense or defense of another if: [¶] 1. The defendant reasonably believed that she or Michael Laut was in imminent danger of being killed or suffering great bodily injury. [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger. AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger."

Laut argues that emotions other than fear can be a causal factor in a justifiable homicide. She claims CALCRIM No. 505

requires that fear alone be the cause, and does not take into account instances where there is a mixed motivation. She proposed an instruction that fear need be a substantial factor in the killing, but does not have to be the only factor. The trial court refused Laut's proposed instruction.

Laut's proposed instruction is not a correct statement of the law. In *People v. Nguyen* (2015) 61 Cal.4th 1015 (*Nguyen*), the defendant killed a member of a rival gang. He claimed self-defense. Our Supreme Court stated that although the defendant may be experiencing other feelings along with fear at the time of the killings, self-defense requires that the defendant must "'*act* out of fear alone.'" (*Id*. at p. 1045.) Self-defense is not available where the defendant acts out of fear and the desire to harm the attacker. (*Ibid*.) Our Supreme Court stated in dicta that the defendant did not argue that self-defense applies in the context of mixed motivation where reasonable fear is the but-for cause of the decision to kill. Because the defendant did not raise the issue, the court declined to decide it. (*Id*. at p. 1046.)

Laut's proposed substantial factor test comports with neither the "fear alone" rule in *Nguyen* nor the "but-for" test mentioned in dicta therein.

V.

Laut contends that prosecutorial misconduct denied her due process and a fair trial.

During cross-examination, the prosecutor asked Laut whether she used Dave's Olympic bronze medal as a form of payment to defense counsel. He also asked whether Laut sold her house to pay defense counsel. Defense counsel objected that neither assertion was true and the questions were intended to

impugn the integrity of Laut and her counsel. The trial court sustained the objection.

During argument, the prosecutor told the jury that Laut had six years to prepare her testimony and that she had been coached. Defense counsel objected that use of the word "coached" was misconduct, implying that counsel told Laut what to say. The trial court told the jury to disregard the word "coached."

During rebuttal argument, the prosecutor told the jury: "As a defense attorney, you've got to understand people's roles. Everyone has their roles, and he is representing his client. His client is on trial for murder. He must come up and make an argument to confuse, to distract and to mislead you."

Later in rebuttal, the following occurred:

"[Prosecutor]: But the defense, obviously, because that is his job, to mislead and to distract you—

"[Defense counsel]: Objection, your Honor.

"[Prosecutor]: —and to confuse you.

"[The court]: Sustained.

"[Defense counsel]: That's it.

"[Prosecutor]: And to confuse."

In addition to improper argument, the prosecutor presented a PowerPoint presentation to the jury. Included in the PowerPoint presentation was the statement that defense counsel was "[d]oing his job to mislead and distract the jury."

The trial court admonished the jury as follows: "Before I turn it over to the attorneys, . . . there's a matter I want to address with you. It has to do with something that came up yesterday. There was a statement made during the rebuttal argument describing the job of the defense attorney. It was incorrect, and it was misconduct, and I need to address it. The

statement in particular was that it is the job of a defense attorney to mislead and distract you — actually, precisely, to confuse, distract and mislead you. [¶] That is incorrect. That is not the job of a defense attorney at all. Now, some of these events I can deal with easily by simply instructing you to disregard it. I'm ordering that that is stricken from the record. You are not to embrace it in any fashion for any purpose. However, some of these things are a little more insidious in the possible effects that they have, and they bear further comment by me, and this is one of them. [¶] So there are really two reasons why this is something that I need to comment upon for your consideration. [¶] One is, I think, obvious to you already; and that is, of course, that your task is to focus on the evidence, and the attorneys' comments and their state of mind and whatever is going on in their heads is not evidence and not something for you to consider and irrelevant, frankly. That one is obvious, but it bears consideration. [¶] The bigger issue, though, that if you were to embrace that, that the defense attorney's job is to deceive, then you would have already decided that the defendant is guilty, and that the task of the defense attorney is to try to hide that fact, and that invites you to violate your most fundamental job and duty as a juror, your most fundamental oath; and that is, the presumption of innocence. Okay. [¶] Remember, please, a defendant in a criminal trial in this country is presumed to be innocent. They don't have to prove anything. Now, the job of the defense attorney is to embrace what he has been told by his client as truth and to present it to you in as fair and persuasive a manner as possible. [¶] [The prosecutor] wasn't present for the events either. He is saying to you what he has been told is true. It is a search for truth on both sides. It is

your function to decide what you think actually happened. [¶] But always bear in mind that the defense doesn't have the obligation to prove anything. The burden of proof lies entirely with the People, and they are obligated to prove each element of the charge beyond a reasonable doubt. And if they fail to do that, it is your duty to vote not guilty. [¶] So lest we lose focus, it is not too long, I'm going to read you once again the burden of proof, and then we will get on with business."

After trial, the court fined the prosecutor $500 for misconduct.

A prosecutor's misconduct violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Prosecutorial misconduct that does not render the trial fundamentally unfair violates state law only if it involves the use of deceptive or reprehensible methods in an attempt to persuade the court or jury. (*Id.* at p. 1215.) Included in deceptive or reprehensible methods are personal attacks on opposing counsel. (*Ibid.*)

Here, it was misconduct to tell the jury that Laut had been coached, indicating her counsel had suborned perjury and had mounted a knowingly false defense. It was also misconduct for the prosecutor to tell the jury multiple times that it was defense counsel's job to confuse, distract, and mislead the jury. The statement was even included in a PowerPoint presentation. Finally, the prosecutor improperly impugned Laut's right to counsel by asking questions that suggested that Laut acted improperly by using her husband's property to pay her counsel.

The misconduct was not so egregious as to deny Laut due process under the federal Constitution. Instead, it constituted a state law violation.

The misconduct, although reprehensible, was not prejudicial. First, the trial court's admonition to the jury was comprehensive. The court did more than simply tell the jury to disregard the remarks. Instead, the court expressly told the jury that the prosecutor committed misconduct; that the defense counsel's job is not to confuse, distract, and mislead; that neither counsel was present when the incident occurred; that both counsel must rely on what others have told them; that both counsel are engaged in a search for the truth; and that the jury must focus on the facts. Second, for reasons previously stated, Laut's trial testimony was not convincing. There is no reasonable probability that Laut would have obtained a more favorable result in the absence of the misconduct. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.)

Laut's reliance on *People v. Herring* (1993) 20 Cal.App.4th 1066 (*Herring*) is misplaced. In *Herring*, a jury convicted the defendant of assault with intent to commit rape and attempted rape. His defense was that his victim consented. In final argument, the prosecutor told the jury: "'[Defense counsel] and I aren't any different in a couple of respects. I chose this side and he chose that side. My people are victims. His people are rapists, murderers, robbers, child molesters. He has to tell them what to say. He has to help them plan a defense. He does not want you to hear the truth.' . . . 'He [defense counsel] continues this copout too. He says, hey, look my is [*sic*] client testifying you ought to believe him. He says this was purely consent, but if you don't believe him, if you don't think it was consent then certainly you

have a reason to believe he thinks it was consent. The attorney has a lot of faith in his own client if you don't believe consent then believe he thought he had consent.'" The prosecutor also attacked the defendant: "'He [appellant] wants to have sex with her again. I mean this is primal man in his most basic level. He's [*sic*] idea of being loved is sex. He wouldn't know what love was. He's like a dog in heat. . . .' 'This is primal man. He thinks all I have to do is put a little force on her. Women love this. Every man knows that. . . .' 'He's like a parasite. He never works. He stays at people's homes. Drives people's cars. He steals from his own parents to get anything. He won't work for it.'" (*Id.* at pp. 1073-1074.) When defense counsel objected, the trial court instructed the jury to disregard the prosecutor's comments. We determined that the trial court's admonition to the jury did not cure the harm arising from the misconduct and reversed.

Laut argues that what the prosecutor said here is every bit as egregious as what the prosecutor said in *Herring*. Assuming that to be so, the analysis of prejudice does not end there. As opposed to the brief admonition the trial court gave in *Herring*, the trial court's admonition here was comprehensive. More importantly, the defendant in *Herring* did not have the same credibility problem as Laut. Laut's testimony at trial was completely different from what she told the police.

VI.

Laut contends cumulative error requires reversal.

Errors that standing alone may not require reversal may be prejudicial when the cumulative impact is considered. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.)

For such a long trial, it was remarkably free of error. None of the errors taken separately or together were prejudicial. On

the night of the shooting, Laut showed a consciousness of guilt by hiding the gun, changing her clothes, and telling the 911 operator and the police that there was an intruder. When it became obvious it was she who shot Dave, she changed her version of the events completely. Her belated claim of self-defense lacked credibility.

VII.

Laut contends we must remand for the trial court to exercise its discretion on whether to strike the firearm enhancement.

The trial court imposed a consecutive 25 years to life firearm enhancement pursuant to section 12022.53, subdivision (d). At the time of the sentencing, the trial court lacked the discretion to strike the enhancement. Effective January 1, 2018, the Legislature amended section 12022.53 to give the trial court the discretion to strike the enhancement in the interest of justice. (Stats. 2017, ch. 682, § 2.) Because this case is not final, the amended statute applies. (*In re Estrada* (1965) 63 Cal.2d 740, 742.)

The People argue there is no need to remand the matter because the trial court clearly indicated that it would not have stricken the enhancement. The People point to the trial court's comments at the hearing on a motion for a new trial. The court opined that evidence that Laut suffered from PTSD and BWS was overwhelmed by evidence of the deliberate way she carried out the killing.

But the trial court may wish to consider factors other than the deliberate way Laut carried out the killing in deciding whether to strike the enhancement in the interest of justice. The matter must be remanded for the court to exercise its discretion.

Nothing we have said herein should be construed as indicating how the trial court should rule.

VIII.

Laut contends the case must be remanded so that the trial court can determine whether she qualifies for mental health diversion.

Sections 1001.35 and 1001.36 give the trial court discretion to determine whether the defendant qualifies for diversion on the basis that the defendant's mental disorder, including PTSD, "played a significant role in the commission of the charged offense."

Effective June 27, 2018, after Laut was sentenced, the Legislature enacted a mental health diversion program for defendants diagnosed with qualifying mental disorders, including PTSD. (§ 1001.36, subds. (a) & (b).) *People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted December 27, 2018, S252220, held that the law applies retroactively to those defendants whose appeals are pending at the time of the statute's enactment.

Effective January 1, 2019, the diversion law was amended to exclude certain violent crimes, including murder. (§ 1001.36, subd. (b)(2)(A).) In *In re M.S.* (2019) 32 Cal.App.5th 1177, 1191, review denied June 19, 2019, we held the amendment is retroactive to pending appeals. Because Laut was convicted of murder, the diversion statutes do not apply.

DISPOSITION

The matter is remanded for the trial court to exercise its discretion on whether to strike the firearm enhancement. (§ 12022.53, subd. (d).) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

David R. Worley, Judge

Superior Court County of Ventura

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